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IDAHO PERSONNEL COMMISSION

STATE OF IDAHO

IDAHO DEPARTMENT OF
CORRECTION,

Petitioner/Appellant,

vs.

KELLY SANCHEZ,

Respondent.

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IPC NO. 96-17

DECISION AND ORDER
ON PETITION FOR REVIEW

THIS MATTER CAME FOR HEARING ON PETITION FOR REVIEW on October 19, 2004. Appellant Idaho Department of Correction (“hereinafter “Appellant” or “Department”) was represented by Brian Benjamin. Respondent Kelly Sanchez (hereinafter “Sanchez” or “Respondent”) was represented by John Lynn. The petition for review involves Hearing Officer Ken Bergquist’s (hereinafter “Hearing Officer”) decision dated April 23, 2004 awarding Sanchez attorney fees and costs against the Department and also awarding Sanchez prejudgment interest on the amount of back pay the parties determined and agreed to be owed.

I.
BACKGROUND AND PRIOR PROCEEDINGS

A. Factual Background

Sanchez was a permanent classified employee of the Department. He was employed as a correctional officer at the Pocatello Women's Correctional Center ("PWCC"). In March of 1996, a female inmate (Hansen) at PWCC made a complaint against Sanchez alleging sexual misconduct during the time that Sanchez was her supervisor in the Property Room at PWCC. The complaint was reduced to writing and signed by Inmate Hansen on April 10, 1996. Original Exhibit 15.

Sanchez was notified of the inmate complaint, and was reassigned to a different post at PWCC with no inmate contact. Original Exhibit 12. He was advised that the matter had been referred to the Bannock County Prosecutor for investigation due to the nature of the allegations and that, if substantiated, could result in the filing of felony charges. *Id.* On April 8, 1996, the Bannock County Prosecutor advised the Department that there was insufficient evidence to support the filing of criminal charges. On April 10, 1996, PWCC Warden, Bona Miller, met with Sanchez and advised him that the Bannock County Prosecutor had elected not to file charges, but the Department was initiating an internal investigation of the inmate allegation. On that date, Sanchez was told he had three (3) options regarding the internal investigation:

1. Cooperate with the investigation and submit to a polygraph examination;
2. Refuse to cooperate with the investigation and not take a polygraph examination; or
3. Resign without prejudice.

Hearing Officer's Original Findings of Fact, Conclusions of Law and Order, dated October 10, 1997, Finding of Fact VII (hereinafter "Original Order, Finding of Fact ____"); Original Exhibit 11.

Sanchez was also advised that if he refused to cooperate and submit to a polygraph, he would be ordered to do so and failure to comply with the order would result in termination. Despite the fact that Sanchez indicated that he did not want to take a polygraph, Warden Miller gave him the opportunity to go home and think about the ramifications of each of the options and to not let her know his decision until the next day. *Id.* The following day, April 11, 1996, Warden Miller met with Sanchez to discuss his decision, at which time he advised her that he had conferred with his attorney and refused to submit to the polygraph examination. Original Order, Finding of Fact VIII. On April 12, 1996, Sanchez provided Warden Miller with a written notice that he refused to take the polygraph. Original Exhibit 9.

On April 15, 1996, Sanchez was notified of his dismissal from the Department for violating department and administrative policies regarding refusal to cooperate in an investigation and failing to obey a lawful order, as well as violation of Commission Rules 190.01(a) and (b). Original Order, Finding of Fact X; Original Exhibit 8.

Sanchez filed a grievance of his dismissal on April 24, 1996, requesting that a complete review of the circumstances surrounding his dismissal and the consideration of other alternatives to the decision to terminate his employment. Original Order, Finding of Fact XI; Original Exhibit 7. An impartial review panel determined that Sanchez had violated the Department policies. The panel was concerned, however, that Sanchez had not been given a Garrity warning that any polygraph results obtained as a result of the

internal investigation could not be made available to the prosecutor or be used to prosecute him. Because of this concern, the panel recommended that Sanchez be given one (1) more opportunity to submit to the polygraph exam. Original Order, Finding of Fact XII. The Department accepted the panel's recommendation on June 19, 1996, and Sanchez ultimately did take a polygraph examination. The results of that polygraph were "inconclusive" and the polygrapher's report stated that the test was "invalidated due to [Sanchez's] claim of back pain to which he claimed to have sustained from running just prior to the polygraph examination." Original Order, Finding of Fact XV; Original Exhibit 103.

After learning that the polygraph had been invalidated, on August 19, 1996, James Spaulding, the Department Director, notified Sanchez that the initial disciplinary decision was being modified. Instead of termination, the Department imposed a thirty (30)-day suspension and transferred Sanchez to South Idaho Correctional Institution ("SICI") in Boise. This was based on the Director's determination that Sanchez's "failure to cooperate in the internal investigation" was a "major breach of policy." Original Order, Finding of Fact XVI; Original Exhibit 4. Sanchez never appealed this decision to the Commission.

Sanchez served his thirty-day suspension, which began on August 25, 1996 and ended September 21, 1996. On August 28, 1996, Sanchez wrote a letter to the Director indicating that he would accept the disciplinary sanction of a suspension, but that the Director's "request" to have him transferred to SICI was "unreasonable" and asked him to consider reinstating him either at PWCC or in a position in the Probation and Parole Office in Pocatello. Original Order, Finding of Fact XIX; Original Exhibit 3. The

Director responded to Sanchez in a letter dated September 16, 1996, explaining his decision to transfer him to another facility and suggested he contact Larry Wright, the Warden at SICI, to make the necessary arrangements for reporting to work. Original Order, Finding of Fact XX; Original Exhibit 105. Sanchez did not contact Warden Wright or appear for duty at SICI. Instead, he wrote another letter to the Director on September 26, 1996 (five days after expiration of his suspension), stating that he “respectfully declined” the offer of a transfer. Original Order, Finding of Fact XXI; Original Exhibit 2. Thereafter, on September 27, 1996, the IDOC notified Sanchez that he was being dismissed since he apparently had refused the transfer and did not report for duty. His dismissal was effective September 21, 1996. Original Finding of Fact XXII; Original Exhibit 1.

B. Procedural History

This case has had a long and complicated procedural history. After his dismissal, Sanchez filed an Appeal to the Commission, raising the following issues:

1. His dismissal was disciplinary and without proper cause;
2. His dismissal was in retaliation for his earlier grievance; and
3. The Department’ decision to transfer Sanchez from PWCC to SICI was not in compliance with Department policies regarding transfer, and was arbitrary and capricious.

The Department responded that the matter was not appealable to the Commission because transfers were not appealable under Idaho Code § 67-5316. The parties submitted the matter to the Hearing Officer for decision on the briefs and exhibits and on

October 10, 1997, the Hearing Officer issued his Findings of Fact, Conclusions of Law, and Order (Original Order) dismissing the appeal for lack of jurisdiction. On October 28, 1997, Sanchez submitted a Petition for Review to the full Commission requesting review of the Order dismissing the appeal for lack of jurisdiction. The parties agreed to submit the matter for review based on the record as presented to the Hearing Officer. Based on the record, the Commission issued a Decision and Order on Petition for Review affirming the Hearing Officer's Order on February 23, 1998.

Sanchez then appealed the Commission's decision to the district court. On October 5, 1998, the district court issued its Memorandum Decision vacating the Commission decision and remanding the matter to the Hearing Officer for a factual finding as to whether the transfer was intended to be administrative or disciplinary in nature. The Department appealed and Sanchez cross-appealed from the district court's decision to the Idaho Supreme Court. On July 6, 2000, the Idaho Supreme Court found that the record before the Court was "ambiguous as to the the Department's motivation behind the rejected transfer that was the justification for the renewed dismissal order." *Sanchez v. Idaho Dep't of Correction*, 134 Idaho 523, 525 (2000). The Court again vacated the Commission decision and the case was remanded to the Hearing Officer for determination of whether Appellant's transfer was administrative or disciplinary in nature.

A hearing on the remand was held on April 1 and 2, 2002. On March 20, 2003, the Hearing Officer issued Supplemental Findings of Fact, Conclusions of Law and Order on Remand. The Hearing Officer found that the involuntary transfer was disciplinary in nature and therefore, within the jurisdiction of the Commission under Idaho Code § 67-

5316, “as it arose from a modified discipline after Sanchez grieved the original dismissal.” (Supplemental Finding of Fact XXXV and Supplemental Conclusion of Law D). The Hearing Officer further concluded that a transfer was not a disciplinary option to the Department and that Sanchez was, therefore, “improperly disciplined.” (Original Finding of Fact XXXIV.) The Hearing Officer held that the transfer order was defective and not a proper order for the reason that no notice was given to Sanchez of a right to grieve the transfer, nor did the Department secure a written waiver from him of the right to grieve. Based on this reasoning, the Hearing Officer concluded that Sanchez was discharged without proper cause. (Supplemental Conclusion of Law E).

The Hearing Officer further concluded that the Department had no authority to order Sanchez to submit to a polygraph under Idaho Code §§ 44-903 and 44-904 because the Department is not a “law enforcement agency.” (Supplemental Conclusion of Law F). The Hearing Officer ordered that Sanchez be reinstated and reimbursed all pay and benefits to which he would have been entitled during the period of his dismissal, “subject to mitigation for outside income received by him since his dismissal.” (Supplemental Conclusion of Law H). The Hearing Officer also awarded Sanchez attorney fees and costs pursuant to Idaho Code § 12-117(1). (Supplemental Conclusion of Law I).

Following this supplemental order, Sanchez filed a memorandum of attorney fees and costs on March 28, 2003. The Department timely filed with the Hearing Officer an Objection to Attorney Fees and Costs and a memorandum in support thereof on April 10, 2003. On April 23, 2003, the Department filed a Petition for Review; however, still pending before the Hearing Officer was the issue of attorney fees and costs.

During this time period, the parties exchanged information regarding the mitigation offset ordered by the Hearing Officer and settled the dispute regarding back pay, reinstatement, and all other issues except attorney fees and costs and prejudgment interest. On September 9, 2003, Sanchez submitted a Request for Prejudgment Interest on the amount of his back pay award that, at that time, had already been settled and paid. It was not until April 23, 2004, that the Hearing Officer issued an Order Awarding Attorneys Fees and Prejudgment Interest. Attorney fees and costs were awarded not pursuant to Idaho Code §12-117, but pursuant to Idaho Code § 12-121. On May 13, 2004, the Department filed an Amended Petition for Review narrowing the scope of the issues from the original Petition to only the award of attorney fees and costs and prejudgment interest.

II. ISSUES

- (1) Did the Hearing Officer err in awarding attorney fees and costs to Sanchez?
- (2) Did the Hearing Officer err in making an award of prejudgment interest?

III. STANDARD OF REVIEW

The standard of review on disciplinary appeals to the Commission is as follows:

When a matter is appealed to the Idaho Personnel Commission it is initially assigned to a Hearing Officer. I.C. § 67-5316(3). The Hearing Officer conducts a full evidentiary hearing and may allow motion and discovery practice before entering a decision containing findings of fact and conclusions of law. In cases involving Rule 190 discipline, the state must prove its case by a preponderance of the evidence. IDAPA 29.01.01.201.06. That is, the burden of proof is one the state to show that at least one of the proper cause reasons for dismissal, as listed in I.C. § 67-5309(n) and IDAPA 28.01.01.190.01, exist by a preponderance of the evidence.

On a petition for review to the Idaho Personnel Commission, the Commission reviews the record, transcript, and briefs submitted by the parties. Findings of fact must be supported by substantial, competent evidence. *Hansen v. Idaho Dep't of Correction*, IPC No. 94-42 (December 15, 1995). We exercise free review over issues of law. The Commission may affirm, reverse, or modify the decision of the Hearing Officer, may remand the matter, or may dismiss it for lack of jurisdiction. I.C. § 67-5317(1).

Soong v. Idaho Dep't of Welfare, IPC No. 94-03 (February 21, 1996), *aff'd*, 132 Idaho 166, 968 P.2d 261 (Ct. App. 1998).

IV. DISCUSSION

A. The Commission Does Not Have the Required Statutory Authority to Award Attorney Fees and Costs in this Case.

Idaho follows the “American Rule” meaning “that attorney fees are to be awarded only where they are authorized by statute or contract.” *Heller v. Cenarrusa*, 106 Idaho 571, 578, 682 P.2d 524, 531 (1984); *Owner-Operator Indep. Drivers. v. Idaho Pub. Util. Comm'n*, 125 Idaho 401, 871 P.2d 818 (1994). The Hearing Officer erred when he awarded Sanchez attorney fees and costs against the Department because Idaho Code § 12-121 (and Idaho Code § 12-117) do not authorize the Commission or its hearing officers to do so, nor do former IDAPA 15.04.01.201.10 (DHR Rule 201.10)¹ or Idaho Code § 67-5316(4) present the Commission an independent basis to do so. Former DHR Rule 201.10, which is applicable in this case, provides as follows:

If the hearing officer finds in favor of the employee in whole or in part, the hearing officer shall make a finding as to whether or not the agency acted without a reasonable basis in fact or law. **If the employee is entitled to**

¹ DHR recently promulgated many changes to the rules during Legislative Session 2004, including revisions to DHR Rule 201.10, which is now DHR Rule 201.11. These revised rules went into effect at the close of the session on or about March 20, 2004. However, for purposes of this appeal, former DHR Rule 201.10 is applicable and in effect at all relevant times involving this matter.

statutory attorney fees and costs, counsel for the employee shall file a memorandum of costs . . .

(emphasis added).

This rule proscribes the procedure to be followed regarding any award of attorney fees and costs only if there is a statutory basis for an award of attorney fees and costs and is not an independent basis for such an award.

1. Attorney fees and costs cannot be awarded pursuant to Idaho Code § 12-121 because administrative proceedings before the Commission and its hearing officers are not “civil actions”.

In his initial award for attorney fees and costs, the Hearing Officer, pursuant to Idaho Code § 12-117(1) and DHR Rule 201.10, held as follows:

I conclude that the alleged bases for Sanchez’ dismissal were not reasonable and that he is entitled to an award of his attorney’s fees and expenses incurred in the proceedings before the Commission, unless an award of attorney’s fees and expenses is precluded under the Supreme Court’s recent decision in Department of Correction v. Anderson, 134 Idaho 680.

Supplemental Findings of Fact, Conclusions of Law, and Order on Remand, p. 11.

In doing so, the Hearing Officer initially awarded attorney fees and costs under Idaho Code § 12-117(1) making the award contingent on whether or not the Commission had authority under recent case law to do so.

The Hearing Officer entertained briefing on the matter from the parties and on April 23, 2004, entered an Order Awarding Attorney’s Fees and Prejudgment Interest. In this order, the Hearing Officer correctly found that Sanchez was not “entitled² to an award of attorney fees” against the Department under Idaho Code §12-117 because the

² Because the Commission finds it is without statutory authority to award attorney fees and costs in this case, the Commission does not reach the issue of whether Sanchez was entitled to his attorney fees and costs; i.e., whether the Department acted without a reasonable basis in fact or law.

Department is not a “state agency” as that term is applicable under section 12-117.³ *Needs v. Idaho State Dep’t of Correction*, 115 Idaho 399, 766 P.2d 1280 (Ct. App. 1988); *Idaho Dep’t of Correction v. Anderson*, 134 Idaho 680, 8 P.3d 675 (2000).

However, in the Order Awarding Attorney’s fees and Prejudgment Interest, the Hearing Officer awarded attorney fees and costs to Sanchez against the Department pursuant to Idaho Code § 12-121. *See* Order Awarding Attorneys Fees and Prejudgment Interest, p. 2. In so holding, the Hearing Officer utilized the same “bases and reasons” for the award as he had previously set forth in his Supplemental Order where he awarded fees and costs pursuant to Idaho Code § 12-117. This award of attorney fees pursuant to section 12-121 is erroneous as a matter of law.

Idaho Code § 12-121 states in pertinent part:

In any civil action, the judge may award reasonable attorney’s fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney’s fees. The term “party” or “parties” is defined to include any person, partnership, corporation, association, private organization, the State of Idaho or political subdivision thereof.

(Emphasis added). This section authorizes the court to award reasonable attorney fees to a prevailing party in **civil actions** and the Idaho Appellate Courts have refused to allow Idaho Code § 12-121 to be used to authorize an award of attorney fees in administrative

³ Idaho Code § 12-117 (1) provides that “. . . in any administrative or civil judicial proceeding involving as adverse parties a **state agency**, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney’s fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.” (Emphasis added). Idaho Code § 12-117(4)(b) defines “state agency” as meaning “any agency as defined in section 67-5201, Idaho Code.” Finally, Idaho Code § 67-5201(2) specifically excludes from the definition of “Agency” the “state board of correction”. *See Idaho Dep’t of Correction v. Anderson*, 134 Idaho 680, 690, 8 P.3d 675, 685 (Ct. App. 2000) (citing *Needs v. Idaho State Dep’t of Correction*, 115 Idaho 399, 401, 766 P.2d 1280, 1282 (Ct. App. 1988). “[B]ecause the State Board of Correction exercises its constitutional and statutory authority through the instrumentality of the Department of Correction”, this provision excluding the Board of Correction from the application of section 12-117 also excludes the Department of Correction. *Id.*

proceedings or on appeal from administrative proceedings. Such proceedings are not “civil actions” which are actions “commenced by filing a complaint with the court”. See I.R.C.P. 3(a); *Lowery v. Bd. of County Comm’rs*, 117 Idaho 1079, 793 P.2d 1251 (1990) (holding that appeal to district court of county zoning commission decision was not a civil action and no award of attorney fees could be made under section 12-121); *Johnson v. Idaho Cent. Credit Union*, 127 Idaho 867, 908 P.2d 560 (1995) (holding that attorney fees could not be awarded pursuant to section 12-121 in an unemployment compensation case because a claim for unemployment benefits is not a “civil action” as claimant does not commence the same by the filing of a complaint pursuant to I.R.C.P. 3(a)); *Eagle Water Co. v. Idaho Pub. Util. Comm’n*, 130 Idaho 314, 940 P.2d 1133 (1997) (holding that attorney fees under section 12-121 are not available in an appeal from an order of the Idaho Public Utilities Commission because it was not a case commenced by filing a complaint in a court action); and *Knight v. Dep’t of Ins.*, 119 Idaho 591, 808 P.2d 1336 (Ct. App. 1991) (holding that attorney fees under section 12-121 are not available to parties in an appeal from an agency decision since the process of such an appeal is not commenced by a complaint filed in a court action).

In fact, the Idaho Supreme Court has recently reiterated its position concerning the awarding of attorney fees in administrative proceedings holding that “I.C. § 12-117 provides the exclusive basis upon which to seek an award of attorney fees against a state agency.” *Westway Constr., Inc. v. Idaho Transp. Dep’t*, 139 Idaho 107, ___, 73 P.3d 721, 730 (2003) quoting *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 718, 723, 947 P.2d 391, 396 (1997).

As in the above-cited cases, this case is not a civil action that commenced with the filing of a complaint in district court. It is clearly an administrative proceeding brought pursuant to the Idaho Personnel System Act, Idaho Code § 67-5301, et seq. Therefore, attorney fees and costs cannot be awarded to Sanchez under Idaho Code § 12-121 and the Hearing Officer erred as a matter of law in making such an award.

2. Idaho Code § 67-5316(4) does not authorize the awarding of attorney fees and costs in Commission proceedings.

It is Sanchez's position, as indicated in Sanchez's counsel's Memorandum in Opposition to Petition for Review, pp. 2-3, that the Commission has historically awarded fees and costs under DHR Rule 201.10 pursuant to statutory authority contained at Idaho Code § 67-5316(4).

Section 67-5316(4) provides as follows:

Where the action in dispute was the discharge, demotion, or suspension, upon determination that proper cause did not in fact exist within the definitions set forth in section 67-5309(n), Idaho Code, or that the action was taken by reason of illegal discrimination, the commission or the hearing officer shall order the reinstatement of the employee in the same position or a position of like status and pay, with or without loss of pay for the period of discharge, demotion, or suspension, or **may order such other remedy as may be determined to be appropriate.** In all other disputed matters, the commission and the hearing officer may order such action as may be appropriate.

(Emphasis added.)

Sanchez argues that the bolded part of the above-referenced statute, which provides that the Commission and/or hearing officer may “order such other remedy as may be determined to be appropriate”, gives the Commission the authority to award attorney fees and costs in Commission proceedings.

In making this argument, Sanchez notes that the Commission has awarded attorney fees and costs to Department employees (against the Department) in the past. *See Anderson v. Idaho Dep't of Correction*, IPC No. 96-11; *Dep't of Correction v. Morriss*, IPC No. 95-21; *Dep't of Correction v. Weirum*, IPC No. 97-03. This is true. However, upon review of these cases, in each, the hearing officer and Commission did not refer to any statutory basis for such awards, instead only referring to the procedural rule (DHR Rule 201.10). In *Weirum* and *Morriss*, there was no challenge to the Commission's authority to award attorney fees and the issue was not raised or addressed. In *Anderson*, the issue was raised on appeal to the Idaho Court of Appeals, which found that the Court may not award attorney fees and costs against the Department under Idaho Code § 12-117. *Idaho Dep't of Correction v. Anderson*, 134 Idaho 680, 685, 8 P.3d 675, 690 (Ct. App. 2000). The Court, however, did not address whether the Commission erred in awarding attorney fees and costs to Anderson at the administrative level, (prior to appeal to the district court) because the Department did not identify the statutory authority under which the award was made. *Id.*

Although the Anderson court did not address this issue, the Commission now does. Upon examination of this issue, the Commission finds that Idaho Code § 67-5316(4) does not provide the Commission statutory authority for the awarding of attorney fees and costs.

The Idaho Legislature has authorized the award of attorney fees in only a few clearly defined circumstances. It is Idaho Code § 12-117 which provides the Commission the authority to award attorney fees and costs in cases coming before it. *See Stewart v. Dep't of Health and Welfare*, 115 Idaho 820, 771 P.2d 41 (1989), and, as

mentioned above, the Idaho Supreme Court has held that such authority granted by section 12-117 is the exclusive authority for awarding attorney fees against state agencies in administrative proceedings. *See Westway*, 73 P.3d at 730. Other circumstances, in limited context, where the legislature has allowed for attorney fees include: Idaho Code §§ 12-120 and 12-121 allowing the courts to set attorney fees in civil damage suits under certain conditions; under the Consumer Protection Act, Idaho Code § 48-608(3); in divorce proceedings pursuant to Idaho Code § 32-704; reasonable refusal to honor insurance claims under Idaho Code § 41-1839; for violation of state securities law, Idaho Code § 30-1446(1); in actions involving proceedings brought under the Worker's Compensation Act pursuant to Idaho Code § 72-210. *See Idaho Power Co. v. Idaho Pub. Util. Comm'n*, 102 Idaho 744, 751, 639 P.2d 442, 449 (1981).

Reviewing the foregoing statutes, it is clear that the Idaho Legislature has provided for the award of attorney fees specifically when it so intends and only when it so intends. *Id.* In *Idaho Power Co. v. Idaho Pub. Util. Comm'n*, the Idaho Supreme Court considered whether Public Utilities Commission ("PUC") enabling statutes⁴ gave the PUC the authority to promulgate intervenor funding rules to provide for the awarding of attorney fees and costs in Public Utility Regulatory Policies Act ("PURPA") proceedings. *Id.* at 750. The Supreme Court found no such authority. The Court did find that I.C. § 61-501 empowers the PUC to supervise and regulate public utilities throughout the state and to do all things necessary in carrying out the spirit and intent of public utilities law.

⁴ I.C. § 61-501 "Investment of authority.-The public utilities commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of this act".

I.C. § 61-601 "Practice-Evidence.- All hearings and investigations before the commission or any commissioner shall be governed by this act and by rules of practice and procedure to be adopted by the commission, and in the conduct thereof neither the commission nor any commissioner shall be bound by the technical rules of evidence."

The Court additionally found that I.C. § 61-601 grants the PUC power to adopt rules of practice and procedure so as to carry out the spirit and intent of public utilities law in Idaho. *Id.* However, the Court was clear in finding that it would not be proper to interpret those provisions to authorize the PUC to compensate consumer intervenors in the absence of a specific statute to that effect, particularly in light of the general rule that attorney fees cannot be recovered unless there is such a statute. *Id.* (citations omitted).

Likewise, in this case, a review of Idaho Code § 67-5301, et seq., including Idaho Code § 67-5316(4), reveals a complete absence of any authority that would empower the Commission to either adopt rules governing the awarding of attorney fees and costs or to actually award attorney fees and costs in Commission cases. Certainly, of course, the Commission, through DHR, has the authority to adopt rules of practice and procedure; however, nothing in the Idaho Personnel Act grants the Commission any specific authority concerning the awarding of attorney fees and costs.

Just as the broad language of Idaho Code §§ 61-501 and 61-601 did not empower the Public Utilities Commission to award attorney fees and costs in *Idaho Power Company*, Idaho Code § 67-5316(4) (generally and broadly giving the hearing officers and commissioners the power to order “such other remedy as may be determined to be appropriate” in cases where an employee was wrongfully disciplined), does not give the Commission and its hearing officers the specific authority to award attorney fees and costs.

B. An Award of Prejudgment Interest Cannot be Granted Against The Department Because it is Immune.

The State of Idaho (and its instrumentalities) is liable for interest only when it consents thereto by statute or contract. *American Oil Co. v. Neill*, 90 Idaho 333, 338, 414

P.2d 206, 209 (1966). This is based on the general precept of sovereign immunity providing that a governmental unit can be sued only upon its consent, such consent generally arising from the constitution or legislative enactment. *Univ. of Utah Hosp. v. Twin Falls County*, 122 Idaho 1010, 1017-18, 842 P.2d 689, 696-97 (1992) (citing *American Oil*, 90 Idaho at 338; *Davis v. State*, 30 Idaho 137, 143, 163 P. 373, 209 (1917)). This doctrine also prevents assessment against state entities for interest on its debts, absent consent. See Idaho Constitution art. VII, § 13 (“[n]o money shall be drawn from the treasury, but in pursuance of appropriations made by law”). *Univ. of Utah Hosp.*, 122 Idaho at 1017 (citations omitted). Absent constitutional language or a specific statute, the state may not pay interest. Consent may also be found by way of an express or implied contractual provision, but that is immaterial in this case. *Id.* at 1018 (citations omitted).

Further, the Supreme Court stated in *Univ. of Utah Hosp.* that:

Neither does the existence of a general statute regarding the rate of interest and the allowance of interest between parties to actions automatically include the state within its purview. (Citations omitted.) In order to overcome the presumption of sovereign immunity, there must be a more specific assertion by the legislature. Therefore the County [Hospital] cannot rely upon the Idaho general statute on recovery of interest, I.C. § 28-22-104(1), in this case.

In that case, the Supreme Court refused to assess prejudgment interest against the county despite the fact that the plaintiff was awarded a judgment and the statute and case law provided that the interest should run from the date the county received the plaintiff’s indigency application up until the date judgment was rendered. Although the state’s sovereign immunity with respect to **post-judgment interest** has been overruled by the Supreme Court (See *County of Ada v. Red Steer Drive-Inns of Nevada, Inc.*, 101 Idaho 94, 609 P.2d 161 (1980)) it has made specifically clear that the general rule of sovereign

immunity as set forth in *American Oil*, 90 Idaho 333, still exists with regard to **prejudgment interest**. *Univ. of Utah Hosp.*, 122 Idaho at 1018 (specifically limiting the holding in *Red Steer* to allowing for post-judgment interest against the county and declining to extend *Red Steer's* rationale on the issue of prejudgment interest).

In the present case, following the above-cited authority, Idaho Code § 28-22-104 (regarding the general statutory rate of interest) does not overcome the presumption of sovereign immunity granted to the State of Idaho.

As he did with respect to his attorney fees and costs argument, Sanchez argues that Idaho Code § 67-5316(4) provides the specific statutory authority for the awarding of prejudgment interest:

. . . . The Commission or the hearing officer shall order the reinstatement of the employee in the same position or a position of like status and pay, with or without loss of pay for the period of discharge, demotion, or suspension, **or may order such other remedy as may be determined to be appropriate**.

(Emphasis added).

Sanchez's argument must fail. The general authority granted the Commission and its hearing officers by the bolded portion of Idaho Code § 67-5316(4) (above) cannot be read to grant the authority to grant prejudgment interest against the Department in light of the authority discussed. While section 67-5316(4) does specifically discuss the Commission's authority to award back pay (or not), there is no specific granting of any authority by which the Commission could award [prejudgment] interest on that back pay. Had the legislature so intended to grant this authority, it specifically would have. Just as the § 67-5316(4) language "or may order such other remedy as may be determined to be

appropriate” does not grant the Commission authority to award attorney fees and costs, nor does it grant the specific authority required to award prejudgment interest.

Upon review, the Commission finds no authority in the Idaho Personnel System Act (Idaho Code § 67-5301, et seq.) that would overcome Correction’s sovereign immunity with regard to prejudgment interest nor is there any express or implied contractual provision to waive or consent to Correction’s immunity. Therefore, based upon Correction’s sovereign immunity, which has not been waived, the Hearing Officer erred as a matter of law in awarding prejudgment interest.⁵

V. CONCLUSION

Old DHR Rule 201.10 only provides the procedure for the awarding of attorney fees and costs by the Commission when warranted and when allowed by statute. The rule does not provide independent authority to award attorney fees and costs. The Hearing Officer erred as a matter of law in awarding Sanchez attorney fees and costs under § 12-121 because IPC proceedings are not “civil actions” and the law is clear that attorney fees can only be awarded under § 12-121 in civil actions. Further, the law is clear that attorney fees and costs cannot be awarded against the Department pursuant to § 12-117 because the Department is not a “state agency” under that statute (referencing § 67-5201(2)). Finally, I.C. § 67-5316(4) does not provide the Commission independent statutory authority to award attorney fees and costs.

The Hearing Officer also erred in awarding prejudgment interest on Sanchez’s back pay award. Principles of sovereign immunity preclude such an award absent

⁵ Because the Commission finds The Department (as a state agency) is immune from any award of prejudgment interest under principles of sovereign immunity, the Commission does not reach the issue of whether prejudgment interest is appropriate pursuant to Idaho Code § 28-22-104; i.e., whether the back pay award in this case was liquidated or ascertainable by mathematical computation.

specific statutory authority or consent by the State. There has been no consent by the Department and the case law is clear that I.C. § 28-22-104 (the general statute on interest) does not overcome the presumption of sovereign immunity in favor of the Department. Finally, again, the general language “or may order such other remedy as may be determined to be appropriate” in I.C. § 67-5316(4) cannot be read to grant the Commission the specific authority required to allow an award of prejudgment interest.

For these reasons, the Commission hereby reverses the Hearing Officer’s awarding of attorney fees and costs and prejudgment interest to Sanchez.

VI.

STATEMENT OF APPEAL RIGHTS

Either party may appeal this decision to the District Court. A notice of appeal must be filed in the District Court within forty-two (42) days of the filing of this decision. Idaho Code § 67-5317(3). The District Court has the power to affirm, or set aside and remand the matter to the Commission upon the following grounds, and shall not set the same aside on any other grounds:

- (1) That the findings of fact are not based on any substantial, competent evidence;
- (2) That the commission has acted without jurisdiction or in excess of its powers;
- (3) That the findings of fact by the commission do not as a matter of law support the decision. Idaho Code § 67-5318.

DATED this ____ day of December, 2004.

BY ORDER OF THE
IDAHO PERSONNEL COMMISSION

Mike Brassey, Commission Chair

Don Miller, Commissioner

Pete Black, Commissioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to the following parties by the method stated below on this ____ day of December, 2004.

FIRST CLASS MAIL

John C. Lynn
Lynn, Scott & Hackney, P.L.L.C.
500 W. Bannock
Boise, ID 83702

Brian Benjamin
Deputy Attorney General
Statehouse, Room 210
Boise, ID 83720-0010

Laurie L. Jilbert
Secretary to the Idaho Personnel Commission